80-1851

No.

Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1980

JOSE ALMAGUER,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

1. Whether the trial court's failure to inform the Petitioner that if he pled guilty there would be no further trial of any kind, in violation of Fed. R. Crim. Pro. 11(c)(4), requires reversal.

2. Whether the trial court's failure to inform the Petitioner of the "perjury peril", described in Fed. R. Crim. Pro. 11(c)(5), requires reversal.

3. Whether the trial court's failure to determine that the guilty plea was not the result of promises apart from the plea agreement, in violation of Fed. R. Crim. Pro. 11(d), requires reversal.

4. Whether the cumulative violations of Fed. R. Crim. pro. 11 require reversal of this federal guilty plea.

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IN THE

Supreme Court of the United States

October Term, 1980

No.

JOSE ALMAGUER,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Jose Almaguer, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States of Appeals for the Fifth Circuit rendered in these proceedings on December 17, 1980. Petitioner's Motion for Rehearing En Banc was denied March 5, 1981.

OPINION BELOW

The original opinion of the United States Court of Appeals for the Fifth Circuit is reported at 620 F.2d 557. The opinion on the United States' Motion for Rehearing is reported at 632 F.2d 1265. Both appear in the Appendix hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered December 17, 1980. Petitioner's Motion for Rehearing En Banc was denied March 5, 1981.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Fed. R. of Crim. Pro. 11 appears in the Appendix hereto.

STATEMENT OF THE CASE

Jurisdiction in this federal criminal case is founded upon 18 U.S.C. § 3231. Petitioner entered a guilty plea under Fed. R. Crim. Pro. 11 to the offense of delivery of heroin. He did so under a plea agreement which provided that in exchange for his plea of guilty, an additional count charging delivery of heroin would be dismissed. He was sentenced to a term of fifteen (15) years in prison with a special parole term of five (5) years.

The admonitions and interrogation of Petitioner at the guilty plea proceeding were not in compliance with Rule

11. In particular, the Court failed to inform Petitioner that if he pled guilty there would be no further trial of any kind, and that if he pled guilty and was placed under oath, his answers to questions under oath, on the record, and in the presence of counsel could be used against him in a prosecution for perjury. The Court also failed to inquire as to whether the guilty plea was the product of promises outside the plea bargain.

REASONS FOR GRANTING THE WRIT

I. A CONSISTENT STANDARD FOR FEDERAL GUILTY PLEAS IS DESIRABLE.

In *McCarthy* v. *United States,* 394 U.S. 459 (1969), this Court ruled that strict compliance with Rule 11 was required, and that failure to so comply would result in reversal. However clear that mandate seemed at the time, it has not proved to be the last word on Rule 11 procedure. In 1975, Rule 11 was substantially amended and its general requirements made more specific. This event has prompted several circuits to adopt various substantial compliance and harmless error rules. In view of the fact that guilty plea proceedings account for a large percentage of criminal disposition in the federal courts, such diversity is undesirable. Further, the availability of transfers from one district to another for the purpose of guilty pleas, permitted in Fed. R. Crim. Pro. 20, makes a national standard imperative.

A survey of the circuits reveals that two maintain the strict standard articulated in *McCarthy,* holding that any deviation from the literal requirements of Rule 11 requires reversal on direct appeal, regardless of whether any prejudice is demonstrated. They are the Fourth Circuit, *United States* v. *Boone,* 543 F.2d 1090 (4th Cir. 1976) and

the Sixth Circuit, *Phillips* v. *United States,* 519 F.2d 483 (6th Cir. 1975). Neither has considered the standard recently. The Second, Third, Fifth, Seventh and Ninth Circuits have developed various harmless error standards. The Second Circuit comes the closest to a strict standard, but in *United States* v. *Saft,* 558 F.2d 1073 (2nd Cir. 1977), the Court held that the failure to give the warning concerning use of answers in a later perjury prosecution was unnecessary since the practice in the Second Circuit is to refrain from placing defendants under oath at Rule 11 proceedings. This was a departure from that Court's earlier holding in *United States* v. *Journet,* 544 F.2d 633 (2nd Cir. 1976).

The Third Circuit also comes close to a strict standard. In *United States* v. *Carter,* 619 F.2d 293 (3rd Cir. 1980), the Court reversed a case for failure to inform the defendant of many of the Rule 11 provisions, stating, "We find *McCarthy's* logic equally applicable to the 1975 version of Rule 11 . . . for the newer version, in large part, merely explicates and expands upon the 1966 rule." 619 F.2d at 299. However, the Court refused to hold that any deviation from Rule 11 required reversal, although warning that continual deviations by trial judges from Rule 11 might require a per se rule in the future.

The Seventh Circuit has enunciated a substantial compliance test. In *United States* v. *Gray,* 611 F.2d 194 (7th Cir.) cert. denied 446 U.S. 911 (1979), and *United States* v. *Fels,* 599 F.2d 142 (7th Cir. 1979), the Court held that the voluntariness of the plea and understanding of the defendant were to be evaluated as a whole, and that a strict and literal reading of Rule 11 would exalt form over substance in deciding the cases.

The Ninth Circuit has held that a guilty plea will not be reversed, even on direct appeal, unless there is prejudice

shown or the omissions clearly affected the voluntariness of the plea. *United States* v. *Conrad,* 598 F.2d 506 (9th Cir. 1979).

The Fifth Circuit, whose ruling is at issue here, has by far the most complex standard. In *United States* v. *Dayton,* 604 F.2d 931 (5th Cir. 1979), the Court overruled a long line of cases requiring reversal for any deviation from Rule 11, and formulated various standards for various kinds of deviations.

First, the Court denominated the five requirements of Rule 11(c) as "the minimum essentials", and held that an entire failure by the judge to inform the defendant of these consequences "will ordinarily require reversal." 604 F.2d at 937. The Court then went on to identify three "core concerns" of the Rule: absence of coercion, understanding of the accusation, and knowledge of the direct consequences of the plea. An entire failure to address one of these requires automatic reversal. 604 F.2d at 939. The rule of *Chapman* v. *California,* 386 U.S. 18 (1967), is to be applied to inadequate addresses of the core concerns or to "unrelated constitutional errors arising from Rule 11 proceedings." 604 F.2d at 939. In Petitioner's case, and in *United States* v. *Caston,* 615 F. 2d 1111 (5th Cir.) cert. denied 101 S.Ct. 286 (1980), panels of the Court have applied the rule of *Chapman* v. *California* to the omission of the so-called "perjury peril" warning, Rule 11 (c)(5), and have determined that the omission of this warning does not required reversal. This diversity of approach requires clarification from this Court as to the proper standard to be used in Rule 11 cases.

II. STRICT ADHERENCE TO RULE 11 IS MANDATED BY THE LEGISLATIVE HISTORY OF THE AMENDMENTS AND SUPPORTED BY STRONG POLICY ARGUMENTS.

At the time *McCarthy,* supra, was decided, Rule 11 provided only that the Court

> "shall not accept . . . a plea [of guilty] . . . without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea . . . the court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea."

In 1975, the Congress expanded this language, specifying the advice to be given the defendant in Subdivision (c), clarifying the requisites of voluntariness in Subdivision (d), and adding a provision concerning plea agreements in Subdivision (e). The specification of advice to be given the defendant was more detailed in the version actually adopted than in that submitted by the Supreme Court. The House of Representatives developed the version finally adopted, which added to the Supreme Court rule the requirements that the defendant be advised of his right to counsel, including court-appointed counsel if indigent, his right to jury trial with counsel and the right of confrontation, his privilege against self-incrimination, and that if he answers questions under oath, the answers could be used against him in a perjury prosecution. See Proposed Amendments, 62 F.R.D. 271, 280; House Report 94-247, p. 7, 1975 U.S. Code Cong. & Adm. News 674, 679; Conference Committee Report 94-247, p. 7, 175 U.S. Code

Cong. & Adm. News 674 679; Conference Committee Report 94-414, 1975 U.S. Code Cong. Adm. News 680, 714.

It is significant that after this Court ruled that strict compliance with Rule 11 was required, the United States Congress moved to make the requirements of that rule more stringent. In so doing, it seems likely that Congress believed that more specificity of admonition was necessary to assure that each defendant received all the safeguards and information he needed in participating in this most common resolution of a criminal case. The approach of the Circuits in eroding the specific requirements of Rule 11 by sanctioning substantial compliance reduces the specific axioms of Rule 11 to little more than recommendations for how a District Court is to determine certain basic issues. Since Rule 11 was in precisely this form *prior* to the 1975 amendments, this approach simply ignores the legislative intent.

Notwithstanding the fact that 85% of federal convictions are upon pleas of guilty and nolo contendere, (1978 Annual Report of the Director, Administrative Office of the United States Courts, p. 116), relatively few appeals, at least in reported cases, deal with Rule 11 proceedings. Thus, the cost of a strict standard is low. Maintaining a strict standard for compliance in those rare appealed cases serves a useful purpose in reminding District Court Judges that they must not deviate from the standards prescribed by Rule 11. For example, under the current Fifth Circuit rule, District Judges can simply disregard Subdivision (c)(5) of Rule 11 unless the United States Attorney informs them that a prosecution for perjury is contemplated.

For many criminal defendants, the Rule 11 proceedings will be their only court hearing. It is important for the integrity of the criminal justice system in this country that at that hearing, the defendants are given a procedure which will convince them that their convictions, even if unwanted, were at least obtained according to law and were the product of a rational criminal justice system. Such an impression is not conveyed by a District Court which is unable to follow the mandates of its own rules. Almost every circuit court which has dealt with the issue, whatever standard was finally applied, has pointed out that the requirements of Rule 11 are not so onerous at to make them even difficult to meet. All that is required is a check-list, which can simply be a copy of the rule placed before the District Judge, to be checked off as each required admonition or question is covered in the proceeding. An examination of the record in this case shows that the judge attempted to telescope several of Rule ll's requirements into each other, and that the result was a confusing and inadequate admonition. It is the province of this Court to give such judges guidance so that they will realize the importance of strict adherence to Rule 11.

III. EVEN IF EVERY VIOLATION OF RULE 11 DOES NOT REQUIRE AUTOMATIC REVERSAL, THE OMISSIONS HERE REQUIRE REVERSAL.

The Court admonished Petitioner as to his rights as follows:

> THE COURT: Now, Mr. Almaguer, you have a right to plead not guilty. If you plead not guilty you have a right to a speedy trial before a jury with a lawyer. You have a right to summon

> witnesses in your own behalf. You have a right to confront the witnesses of the prosecution and to cross-examine them. You do not have to testify against yourself, but if you do testify and testify falsely you can be prosecuted for perjury . . . If you plead guilty you waive the right to a speedy trial and to a trial before a jury and you do not have the other rights which you have when your plead not guilty. Tr. 30-31.

The Court had earlier given the advice required by Rule 11(c)(1) in at least a cursory way, and Petitioner is not now complaining of any violation of that subdivision.

However, the record does reflect a least two notable omissions from the advice required by the remainder of Rule 11(c). First, the Petitioner was not advised "that if he pleads guilty . . . there will not be a further trial of any kind . . ." Fed. R. Crim. Pro. 11(c)(4). The report of the Advisory Committee on Criminal Rules of the Judicial Conference of the United States makes clear why this admonition, in addition to the Court's statement that Petitioner waived his right to trial *by jury* by pleading guilty, is required:

> "Specifying that there will be no further trial of any kind makes this fact clear to those defendants who, though knowing they have waived trial by jury, are under the mistaken impression that some kind of trial will follow."

Notes of the Advisory Committee on Rules, 62 F.R.D. 271, 280. Thus, the part of the admonition which was specifically within the intention of the Advisory Committee and of Congress was omitted from the admonition given Petitioner.

Secondly, the Court failed to inform Petitioner, pursuant to Rule 11(c)(5), "that if he pleads guilty . . . the Court may ask him questions about the offense . . . and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in prosecution for perjury or false statement." The legislative history reflects that this provision was added specifically to correspond to an amendment in Subdivision (e)(6) which provides that such statements can be used in a perjury prosecution. Notes of the Committee on the Judiciary, House Report No. 94-247, 1975 U.S. Code Cong. & Adm. News 674, 679.

The care with which the various deliberating bodies cast the mandatory advice provisions of Rule 11(c) demonstrates the Congressional intent that compliance with at least these specific items enumerated in Rule 11(c) should be subject to a strict standard on review. Thus, while this Court might adopt a rule allowing for a harmless error standard where other matters required by the rule are inadequately or cursorily addressed, such an approach with respect to the admonitions required by Rule 11(c) is contrary to the legislative intent.

The final omission from the hearing in Petitioner's case was that the Court, although she inquired about whether Petitioner was pleading guilty because of force or violence, failed to make any inquiry with regard to whether Petitioner was pleading guilty because of promises apart from the plea agreement. See Rule 11(d). Such an omission draws into serious question the voluntariness of the plea, and for that reason should not be taken lightly. In this connection, it is noteworthy that when the Court attempted to require Petitioner to commit himself to the fact that he was pleading guilty only because he was guilty and not because of the plea bargain, Petitioner sidestepped the question:

> The Court: Are you pleading guilty because at the time of the sentencing the District Attorney will dismiss Count One of this indictment and will dismiss the Cause No. 3-78-254B, United States v. Almaguer . . . or are you pleading guilty because you know yourself to be guilty?
>
> Mr. Almaguer: I am pleading guilty, Your Honor, because I feel I am guilty. Tr. 33.

Therefore, even if this Court were prepared to depart from the holding in *McCarthy,* and formulate a harmless error standard for inessential violations of Rule 11, the violations involved in this case would require reversal.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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UNITED STATES of America,
Plaintiff-Appellee,

v.

Jose ALMAGUER, *Defendant-Appellant.*
No. 79-5114.

United States Court of Appeals,
Fifth Circuit.

Dec. 17, 1980.

Appeal from the United States District Court for the Northern District of Texas.

ON PETITION FOR REHEARING

Before WISDOM, POLITZ and SAM D. JOHNSON, Circuit Judges.

PER CURIAM:

The application for rehearing is granted. Our prior opinion, dated July 3, 1980, and reported at 620 F.2d 557, is recalled and vacated, and the following is substituted:

Jose Almaguer pleaded guilty to distribution of 3.5 ounces of heroin in violation of 21 U.S.C. § 841(a)(1). He was sentenced to fifteen years imprisonment, with a special parole term of five years. He appeals, asserting that during the conduct of the arraignment at which his guilty plea was accepted, the district court failed to meet the requirements of Fed.R.Crim.P. 11 in four particulars. Having examined and reexamined his contentions in light of our recent en banc decision in *United States v. Dayton,*

604 F.2d 931 (5th Cir. 1979), and our post-*Dayton* decision in *United States v. Caston,* 615 F.2d 1111 (5th Cir. 1980), we find no merit in any of Almaguer's assignments of error and, accordingly, affirm the district court.

Almaguer contends that in the plea hearing the district court failed to address the matters prescribed by subsections (c)(1), (c)(4), (c)(5) and (d) of Rule 11 of the Federal Rules of Criminal Procedure. From our review of the record we are convinced that three of these assertions are totally without merit.

[1] As to the 11(c)(1) complaint, the records is clear that Almaguer understood the nature of the charge and the penalty exposure. The charge is simple intentional distribution of heroin to a particular person at a particular time. The prosecutor first read the charge after which the judge described the offense concisely and in its elemental parts. There is no question but the Almaguer understood.

[2] Subsection 11(c)(4) requires the judge to inform the defendant that after a plea of guilty or nolo contendere there is no further trial. The judge advised Almaguer: "If you plead not guilty you have a right to a speedy trial before a jury with a lawyer" and that if he pled guilty he waived those rights. Almaguer understood.

[3] Subsection (d) relates to the voluntariness of the plea. Almaguer does not contend that he pled guilty due to a promise not revealed in the course of the proceedings. He was specifically asked whether he was pleading guilty because of an agreement "or are you pleading guilty because you know yourself to be guilty?" His response was unequivocal: "I am pleading guilty, Your Honor, because I feel I am guilty." The plea was voluntary.

The only serious complaint raised by Almaguer relates to 11(c)(5) which provides:

> (c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:
>
> * * * * *
>
> (5) that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement.

In *Dayton,* we stated that the judge must inform the defendant about, *inter alia,* the substance of subsection (c)(5) and noted that "an entire failure by the judge to do so will ordinarily require reversal." 604 F.2d at 937. In the *Caston* decision we elucidated further on the 11(c)(5) requirement and held that an omission under this subsection would not occassion and automatic reversal: "Rule 11(c)(5) was added in 1975 to assure the fairness of a subsequent perjury prosecution, not the voluntariness of the plea . . . . Because it is not one of the core inquiries under Rule 11, its omission does not mandate automatic reversal." 615 F.2d at 1116. In *Caston* the court found that the defendant was not being prosecuted for perjury, had suffered no prejudice and thus the error was harmless under the standard of *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

[4] Almaguer is not being prosecuted for perjury. He has not articulated any prejudice as a consequence of the judge's failure to fully discuss the substance of 11(c)(5). As in *Caston,* we find the error to be harmless; it does not warrant a reversal and vacating of the guilty plea.

We can conceive of situations in which a total failure to discuss the 11(c)(5) subject matter would be reversible error. A defendant should be told that upon entering a guilty plea he may be questioned about the offense and that if he answers falsely he subjects himself to a perjury charge. A defendant might plead guilty believing that he may continue to remain silent. That misunderstanding could affect the voluntariness of the plea, but such is not the case here. Almaguer's plea was not tainted; he suffered no prejudice warranting nullification of his plea of guilty.

AFFIRMED.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Jose ALAMAGUER, Defendant-Appellant.
No. 79-5114

United State Court of Appeals,
Fifth Circuit.

July 3, 1980.

PER CURIAM:

Jose Almaguer pleaded guilty to distribution of 3.5 ounces of heroin in violation of 21 U.S.C. § 841(a)(1). He was sentenced to fifteen years imprisonment, with a special parole term of five years. He appeals, asserting that during the conduct of the arraignment at which his guilty plea was accepted, the district court failed to meet the requirements of Fed.R.Crim.P. 11 in four particulars. Having examined appellant's contentions in light of our recent en banc decision in *United States v. Dayton,* 604 F.2d 931 (5th Cir. 1979), and finding merit in one claim of error, we vacate and remand.

Almaguer contends that in the Rule 11 allocution the district court failed to address the matters required by Rule 11(c)(5), Fed.R.Crim.P. We agree.

Rule 11 is entitled Pleas. Subsections (c)(5) provide:

(c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

* * * * *

(5) that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he had pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement.

The government earnestly argues that the essence of 11(c)(5), perjury, was discussed, albeit in a different context than that required by 11(c)(5). The government necessarily refers to the following exchange:

THE COURT: Now, Mr. Almaguer, you have a right to plead not guilty. If you plead not guilty you have a right to a speedy trial before a jury with a lawyer. You have a right to summon witnesses in your own behalf. You have a right to confront the witnesses of the prosecution and to cross-examine them. *You do not have to testify against yourself, but if you do testify and testify falsely you can be prosecuted for perjury. Do you understand that?* (Emphasis ours.)

MR. ALMAGUER: Yes ma'am.

The government would have us extend this advice or warning about perjury in such a way as to achieve an adequate compliance with 11(c)(5). This we may not do.

The court's caution as to perjury was given in the context of an entry of a plea of not guilty and testimony then given at trial. Nowhere do we find any reference to perjury in connection with testimony given after a plea of guilty. Rule 11(c)(5) is very specific, the defendant must be advised that if he pleads guilty the court is authorized to ask questions about the offense, and if the defendant answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement.

A reasonably persuasive argument can be made that because appellant had been warned of the consequences of perjury in the course of a trial, he necessarily must appreciate that peril in connection with a guilty plea. An equally persuasive argument can be made that because he was specifically warned about perjury, if he went to trial, but nothing was said with reference to a guilty plea, he could reasonably conclude that he could avoid this danger by entering a guilty plea.

Even were we to assume that the reference to perjury in the context of trial was a sufficient discussion of perjury as relates to testimony given after a guilty plea, the requirements of Rule 11(c)(5) have still not been met. We do not find in the colloquy any advice from the court that if Almaguer pleaded guilty the court would be entitled to ask him questions about the offense. This is a critical oversight.

In our en banc decision in *Dayton* we sought to review and harmonize the various holdings on Rule 11 and to give a definitive statement of how trial courts should conduct guilty plea hearings. The district court did not have the advantage of *Dayton* at the time of the plea hearing conducted herein. In *Dayton* we listed the seven parts to a Rule 11 hearing. Part number five contains the essence of 11(c)(5) which is at issue in the case at bar. With reference to this requirement we made several observations:

As to the first six of the foregoing requirements, the court must personally address the defendant.

* * * * *

About the first five of these, the court must inform the defendant.

* * * * *

We conclude that the judge *must* inform him of these [the first five] and that an entire failure by the judge to do so will ordinarily require reversal.

604 F.2d at 937.

The failure to address the subject matter required by 11(c)(5) was error. Under the circumstances, we cannot say it was harmless. We are aware of our post-*Dayton* holding in *United States v. Caston,* 615 F.2d 1111 (5th Cir. 1980), that the 11(c)(5) omission therein did not mandate automatic reversal. Automatic reversal may not be mandated; however, in the instant case, considering the totality of the circumstances surrounding the plea hearing and the total failure to address any part of the subject matter required by 11(c)(5), we conclude that a reversal is in order.

We are mindful that *Dayton* also holds that in reviewing guilty plea proceedings we are warranted in regarding the court's acceptance of the plea as a positive finding on each requirement of Rule 11, reviewable by us under the clearly erroneous standard. 604 F.2d at 940-941. However, the verbatim record is before us. The district court simply overlooked addressing the matters required by 11(c)(5). Any finding that Almaguer understood the substance of 11(c)(5) would have to be a finding by implication. Such a finding would be clearly erroneous.

The guilty plea is vacated. The matter is REVERSED and REMANDED for further proceedings consistent herewith.

United States Court of Appeals
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 19

No. 79-5114

D.C. Docket No. CR-3-78-255

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOSE ALMAGUER,
Defendant-Appellant.

Before WISDOM, POLITZ AND SAM D. JOHNSON, Circuit Judges.

JUDGMENT ON REHEARING

This cause came on to be heard on plaintiff-appellee's petition for rehearing;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the opinion originally entered by this Court on July 3, 1980, is

vacated; and that the judgment of the said District Court appealed from is hereby affirmed.

DECEMBER 17, 1980

ISSUED AS MANDATE: MARCH 16, 1981

A true copy test:
Clerk, U.S. Court of Appeals, Fifth Circuit
/s/ By Linda St. Pierre
Deputy
New Orleans, Louisiana

U.S. District Court
Northern District of Texas
FILED: March 18, 1981
by: /s/ Joseph McElroy, Jr., Clerk
Deputy

United States Court of Appeals
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 19

No. 79-5114

D.C. Docket No. CR-3-78-255

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOSE ALMAGUER,
Defendant-Appellant.

APPEAL FROM THE UNITED DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion December 17, 1980, 5 Cir., 198 ____, _____F.2d____).
(March 5, 1981)

Before WISDOM, POLITZ and SAM D. JOHNSON, Circuit Judges.

PER CURIAM:

( ) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate

Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of th Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule (16) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Henry A. Politz
United States Circuit Judge

CLERK'S NOTE: See Rule 41 Frap and Local Rule 17 for stay of the mandate.

FEDERAL RULE OF CRIMINAL PROCEDURE 11

Rule 11. Pleas.

(a) ALTERNATIVES. A defendant may plead not guilty, guilty or nolo contendere. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(b) NOLO CONTENDERE. A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

(c) ADVICE TO DEFENDANT. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

> (1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and
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> (2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and
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> (3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the rights to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and

(4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and

(5) that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement.

(d) INSURING THAT THE PLEA IS VOLUNTARY. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney.

(e) PLEA AGREEMENT PROCEDURE.

(1) *In General.* The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussion with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular

sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.

(2) *Notice of Such Agreement.* If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw his plea.

(3) *Acceptance of a Plea Agreement.* If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) *Rejection of a Plea Agreement.* If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the

defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

(5) *Time of Plea Agreement Procedure.* Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(6) *Inadmissibility of Pleas, Offers of Pleas, and Related Statements.* Except as otherwise provided in this paragraph, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of nolo contendere, or an offer to plead guilty or nolo contendere to the crime charged or any other crime, is admissible in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

(f) DETERMINING ACCURACY OF PLEA. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such in-

quiry as shall satisfy it that there is a factual basis for the plea.

(g) RECORD OF PROCEEDINGS. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.